Industrial Division
Mary 15, 1992

No. 1-91-1365WC

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT, INDUSTRIAL COMMISSION DIVISION

Lyons Township High School, Respondent-Appellant,	)	Appeal from the Circuit Court of Cook County, Illinois
v.	)	Nos. 87-L-51221 and 90-L-50184
The Industrial Commission, et al. (Naomi Treece, Petitioner)	)	Honorable Alexander Alexander White Judge, Presiding
Appellees.	)	

ORDER

This case arises out of Naomi Treece's claim for benefits under Worker's Compensation Act (the Act) (Ill. Rev. Stat. 1989, ch. 48, par. 138.1 et seq.). Treece had three arbitration hearings.

The first two were before Arbitrator Aldolphus Green, who awarded her a total of 33-3/7ths weeks of temporary total disability (TTD) compensation and medical expenses. The third hearing was before Arbitrator Barbara Sherman. However, the record was transferred to Arbitrator Gilberto Galicia for a written decision following Arbitrator Sherman's elevation to commissioner.

Galicia entered an award in favor of Treece finding that she was entitled to TTD from the date of the accident until November 11, 1982, for a total of 103-3/7ths weeks of TTD. However, Galicia found that Treece was no longer suffering from post-concussion syndrome and was instead suffering from underlying psychological problems. For that reason, Galicia denied Treece's application for permanent benefits. The Industrial Commission affirmed Galicia's decision.

On September 9, 1988, the circuit court issued a decision confirming the Commission's decision. However, the circuit court subsequently vacated that decision and on April 17, 1989, issued a second decision reversing the Commission. After arguments on a motion for rehearing brought by Lyons Township High School (Lyons), the circuit court issued a third decision on May 5, 1989, reversing the Commission and remanding the cause to the Commission for reconsideration.

Upon remand, the Commission awarded Treece 175-1/7th weeks of TTD; $1,511.17 for reasonable and necessary medical expenses; a permanent and total disability award of $198.08 per week for life; $15,492 under section 19(k) of the Act (Ill. Rev. Stat. 1989, ch. 48, par. 138.19 (k)) for unreasonable delay of payment; $2,500 under section 19(l) of the Act (Ill. Rev. Stat. 1989, ch. 48, par. 138.19(k)) for unreasonable delay in payment; and attorney fees in the amount of $3,098.

Following the Commission's decision on remand, Lyons appealed to the circuit court. The circuit court confirmed the Commission's decision in its entirety. Treece then brought a motion to correct clerical error. Pursuant to that motion, the circuit court issued another memorandum decision and judgment order dated March 25, 1991. Lyons now appeals from both the May 5, 1989 and the March 25, 1991, circuit court decisions.

The record reveals that an application for adjustment of claim was filed and a hearing on that application was held February 9, 1981. At that hearing, it was disclosed that Naomi Treece was a 41-year-old female employed by Lyons Township High School as a custodian. On November 17, 1980, she was struck in the head by a speaker that fell from the wall where she was working. She drove herself to the Community Memorial General Hospital emergency room. There, she was examined by the attending physician and released.

Treece returned to the hospital later that day for a follow-up examination and was diagnosed as having a concussion. She was admitted to the hospital for four days, then following disputes as to the quality of the care she was receiving, she transferred herself to the University of Chicago Hospital, where she remained for an

additional four days. While there she came under the care of Dr. John Mullan, a board-certified neurosurgeon. Dr. Mullan also diagnosed her as having a concussion and found that she was unable to return to work.

Treece testified that she had been experiencing headaches, nausea, dizziness, and the loss of much of the use of her right hand. She indicated that Dr. Mullan had not released her to return to work and did not know when she could return.

Based upon the foregoing evidence, Arbitrator Green found that Treece was entitled to TTD benefits for the period of November 17, 1980, to January 22, 1981. Neither party filed for review of this decision.

A second application for adjustment of claim was filed and hearing on that application was held on November 13, 1981. At the hearing it was shown that Dr. Mullan believed that Treece had post-concussion syndrome, which was organic in nature. On April 1, 1981, an EEG was performed on Treece which revealed epileptic manifestations. In Dr. Mullan's opinion, both the post-concussion syndrome and the epileptic manifestations were compatible with a relatively mild head injury. He concluded that Treece was unable to return to work. Additionally, he noted that he had referred Treece to psychologist Mary Weed to determine how much of Treece's problem was organic.

On July 22, 1981, Weed performed a standard battery of psychological tests on Treece. Treece performed extremely poorly on these tests. Weed re-tested Treece in October of 1981, at which time Treece's scores were better. Weed indicated that this was probably due to noncompliance by Treece at the first testing.

Based on the results of the tests, Weed concluded that Treece had psychological problems. These psychological problems manifested themselves in Treece's noncompliance in the first testing. Weed indicated that someone with psychological problems like Treece could be agitated by having a speaker fall on her head. However, the results of the tests did not indicate organic brain damage (physical damage). Weed noted that the tests only helped indicate

the presence of organic damage and only a medical doctor was really qualified to make such a diagnosis.

Weed also indicated that Treece's noncompliance may have been because she wanted to make herself seem sicker. Weed stated that such actions were the result of Treece's psychological problems rather than her desire for economic gain.

Dr. David Shenker indicated that after reviewing the medical records he had received it was his opinion that Treece was able to return to work. After examining Treece, he concluded that she did not suffer from significant organic neurological disease and that her complaints could be explained on a psychological basis. He discounted the EEG abnormality and suggested that it may in fact have existed prior to the accident and just never been discovered because she had never had an EEG prior to the accident. Dr. Shenker referred Treece to Dr. David Garron, a clinical psychologist and professor of psychology.

Dr. Garron testified that on October 24, 1981, he saw Treece on a referral from Dr. Shenker. He suggested that her symptoms could have been a side effect of Inderal, a pain medication she had been taking.

On November 3, 1981, Dr. Shenker wrote a letter stating that based on Dr. Garron's report, it appeared that Treece had significant psychiatric problems, but was basically healthy from a physical standpoint and certainly able to return to work.

Treece testified that she was experiencing constant headaches, numbness in her right arm and shoulder, and weight gain. She was still being treated by Dr. Mullan and had not returned to work.

Based upon this evidence, Arbitrator Green found that Treece was entitled to TTD benefits for the period of January 22, 1981 to July 9, 1981. Green also adopted the findings of Dr. Mullan and found Treece's complaints to be credible and consistent with Dr. Mullan's findings. Green found that the services provided by Weed were reasonable. Lyons filed for review, but subsequently dismissed its request.

A third application for adjustment of claim was filed and a hearing on that application commenced on February 25, 1985. In addition to the issues of TTD and permanent disability, Treece also raised the issue of whether penalties should be awarded under sections 19(k), 19(1), and 16 of the Workers' Compensation Act (Ill. Rev. Stat. 1989, ch. 48, pars. 138.19(k), 138.19(1), 138.16).

Evidence was presented showing that the second time Dr. Garron saw Treece was on December 23, 1983. At that time, he noted that her condition appeared to have worsened. At the time of his examination, he did not have an opinion as to whether her condition had an organic component or whether her work-related accident had caused the psychiatric condition. He further indicated that Treece would need to be weaned from her medications before he could render such opinions.

The third time Dr. Garron saw Treece was on August 4, 1984. At that time, he concluded that she was unable to work and recommended hospitalization to wean her from the drugs she was taking. It was his opinion that the medications given to Treece for her injury may have been the cause of her current condition. However, he could not definitively state the cause of her condition. Additionally, he noted that post-concussion syndrome would usually be expected to go away within 18 months to 3 years from the date of the injury, although it could last a lifetime depending on the severity of the blow to the head.

Dr. Glen Glista, a board-certified neurologist, examined Treece on September 13, 1984. It was his opinion that Treece's present condition was unrelated to her accident. He indicated that the vast majority of people suffering such injuries did not develop her problems. He further opined that while it may have been reasonable for Dr. Mullan to find that the accident aggravated her condition transiently for a year, it was not plausible that it aggravated her depression for four years.

Treece testified that she had worked for Lyons for four and one half years as a custodian. Prior to her accident she had been happy and well-adjusted and had never been treated by a psychiatrist or psychologist. However, after her accident, she experienced a variety of problems, including horrible headaches,

weakness in her right hand, loss of concentration, weight gain, and depression. She indicated that she would like to return to work if Lyons would offer her a job, but did not think she could do it.

Dr. Mullan testified that he saw Treece on November 11, 1982. He encouraged her to go back to work because he felt that trial and error was the only way to see if she would be able to work. In his opinion, she was physically able to do the work, the question was whether working would trigger headache pain that would prevent her from continuing. He did not feel she was a malingerer. He noted that an EEG performed on February 17, 1983, was mildly abnormal and showed that the abnormalities noted on April 1, 1981, were still present. Further, he indicated that other EEGs performed on Treece that appeared normal did not mean that a problem did not exist. He indicated that a person could have a normal EEG then suffer a convulsion 30 minutes later. Serial EEGs were needed for a true evaluation. He also indicated that there was no way to differentiate how much of Treece's complaints were functionally as opposed to organically based. He indicated that a jury or an arbitrator would be as skilled as he was in trying to differentiate the two.

Dr. Marvin Ziporyn, a surgeon who was also board eligible in psychiatry, testified that he had never examined Treece, but that he had reviewed the medical testimony in this case. It was his opinion that Treece was suffering from post-concussion syndrome. He based his opinion on the two abnormal EEGs, the history of Treece's symptoms, and the severe initial damage to the cranial contents. He indicated that post-concussion syndrome usually either resolved in two years or did not resolve at all. He admitted that Treece could have been suffering from an organic brain disturbance before the workplace injury occurred. He also admitted that the abnormal EEG could have been abnormal before the injury occurred.

Gary Goldetsky, a clinical psychological intern, interviewed Treece on October 28, 1982. His opinion was that Treece's symptoms were not typical of organic brain syndrome. He found that her response to his tests evidenced questionable effort and motivation. He suggested that she be re-examined by an independent

neurologist or neurosurgeon to determine whether there were physiological or organic contributions to her symptoms and behavior. He noted that absent neurological findings, the possibility of malingering for secondary gain should be investigated. Goldetsky concluded that her job responsibilities as a custodian were modest and that a return to work might be beneficial because it would provide structured experience to improve her self-concept.

Dr. Vincent Sackett examined Treece on September 18, 1984. In his opinion, she was suffering from organic brain syndrome secondary to post-concussion syndrome. He felt that her disability was causally related to the trauma in question. However, he was unable to provide an opinion as to the permanency of the disability due to the medications she was taking. He noted that such an opinion might be possible if she was hospitalized and taken off all medications.

Although Arbitrator Sherman presided over the presentation of evidence in the third hearing, the record was transferred to Arbitrator Gilberto Galicia for a written decision due to Arbitrator Sherman's elevation to commissioner. We note that the testimony of Dr. Garron was erroneously not included in the record provided to Arbitrator Galicia. The treating neurosurgeon Dr. John Mullan's deposition was not in the record.

Galicia entered an award in favor of Treece, finding that she was entitled to TTD from the date of the accident until November 11, 1982, for a total of 103-3/7ths weeks of TTD. However, Galicia found that Treece was no longer suffering from post-concussion syndrome and was instead suffering from underlying psychological problems. For that reasons, Galicia denied Treece's application for permanent benefits.

Subsequent to Galicia's decision, but before review by the Industrial Commission, the record was corrected to include the testimony of Dr. Garron. On October 20, 1987, the Industrial Commission affirmed Galicia's decision. Treece then sought circuit court review of the Industrial Commission's decision.

On September 9, 1988, the circuit court issued a decision confirming the Commission's decision. However, the circuit court later vacated that decision and on April 17, 1989, issued a second decision reversing the Commission. After arguments on a motion for rehearing brought by Lyons, the circuit court issued a third decision on May 5, 1989, reversing the Commission and remanding the cause to the Commission for reconsideration.

Upon remand, the Commission awarded Treece 175-1/7th weeks of TTD; $1,511.17 for reasonable and necessary medical expenses; a permanent and total disability award of $198.08 per week for life; $15,492 under section 19(k); $2,500 under section 19(1); and attorney fees in the amount of $3,098.

Following the Commission's decision on remand, Lyons appealed to the circuit court. The circuit court confirmed the Commission's decision in its entirety. Treece then brought a motion to correct clerical error. Pursuant to that motion, the circuit court issued another memorandum decision and judgment order dated March 25, 1991. Lyons now appeals from both the May 5, 1989, and the March 25, 1991, circuit court decisions.

Lyons first argues that the circuit court erred in setting aside the Industrial Commission's October 20, 1987 decision. Lyons contends that the circuit court did not find that the decision of the Commission was against the manifest weight of the evidence nor did it find that the circuit court improperly substituted its own judgment by weighing the evidence and making a determination of what the Commission's findings should have been.

In contrast, Treece suggests that while the circuit court would have been justified in finding that the Commission's decision was contrary to the manifest weight of the evidence, it did not so hold. Rather, the court exercised restraint and merely remanded the matter to the Commission with directions to re-evaluate the record in light of the court's holding that as a matter of law, the credibility of Treece had already been determined by Arbitrator Green.

The relevant part of the circuit court decision is as follows:

"The Court determines that Arbitrator Galicia erred in reviewing the prior record compiled before Arbitrator Green and then expressly finding that there was a lack of credibility on the part of Petitioner. It was improper for him to again determine the issue of Petitioner's credibility that was previously heard and determined by Arbitrator Green. The Court determines that by not accepting the prior determination of credibility, the finding of the Arbitrator, which was affirmed by the Commission, in respect to causal relation, was prejudicial. Furthermore, it was also improper for Arbitrator Glaicia [sic] to misstate the reason for Dr. Mullen's [sic] referral of Petitioner to Mary T. Weed and Ms. Weed's findings and conclusions concerning Petitioner and her behavior. By so doing the finding of Arbitrator Galicia, which was affirmed by the Commission, in respect to causal relation was prejudicial to Petitioner. The Court determines the matter should be remanded to the Commission for 1) a re-evaluation of the record in respect to the issue of causal relation, accepting the prior determination of credibility by Arbitrator Green, and 2) appropriate findings compatible with the aforesaid re-evaluation."

Section 19(f)(2) of the Workers' Compensation Act (Ill. Rev. Stat. 1989, ch. 48, par. 138.19(f)(2)) provides that the circuit court may "set aside the decision of the Commission * * *, remand the cause to the Commission for further proceedings * * *, and give such other instructions as may be proper." (See Technical Tape Corp. v. The Industrial Comm'n (1974), 58 Ill. 2d 226, 317 N.E.2d 515.) However, the circuit court may not weight conflicting evidence and substitute its judgment for that of the Commission, unless the decision is clearly against the manifest weight of the evidence. Beck v. The Industrial Comm'n (1965), 32 Ill. 2d 148, 204 N.E. 2d 7.

In the instant case, the circuit court specifically held that the Industrial Commission should accept the credibility of Treece. Additionally, the circuit court found that Arbitrator Galicia misstated the reason for Dr. Mullan's referral to Weed and

misstated Weed's conclusions concerning the petitioner and her behavior.

Initially, we note that the circuit court's decision was founded upon questionable grounds since there was no apparent reason why Treece's credibility would remain constant at all the arbitration hearings. At the hearing in question, Treece was testifying about the condition of her injury since the last hearing. In particular, the arbitrator was concerned with the permanency of her condition and how well she was recovering. At the previous hearings, the issues had been limited to the extent of her injury and recovery up to those points for purposes of awarding TTD. Further, medical evidence was offered indicating that Treece's psychological condition might make her want to seem sicker than she really was. As such, her credibility was not a constant which only had to be determined once. Consequently, the circuit court's holding improperly invaded the function of the Commission in that the circuit court ruled that the Commission had to find Treece's testimony credible.

Likewise, the circuit court improperly invaded the province of the Industrial Commission by disputing the Commission's findings with respect to Weed's testimony. Arbitrator Galicia concluded only that Weed's testimony buttressed Lyons's witnesses' testimony that Treece was intentionally doing poorly on the tests and that there was a strong possibility of malingering for secondary gain. Galicia did not conclude that Weed's testimony by itself was sufficient to support such findings. Accordingly, we find that the circuit court erred.

We also find that the original Industrial Commission decision was not against the manifest weight of the evidence. In support of this conclusion, we note that at the third hearing, Dr. Glen Glista indicated that Treece's present condition was unrelated to her accident. Gary Goldetsky's findings supported Dr. Glista's conclusion. We recognize that other evidence was presented which tended to contradict Dr. Glista's conclusion. However, it is properly the function of the Commission to judge the credibility of witnesses, draw reasonable inferences from testimony, and determine the weight to be given to testimony. (Smith v. The Industrial Comm'n (1983), 98 Ill. 2d 20, 455 N.E. 2d 86.)

Additionally, Commission decisions are given great deference as to their findings of fact, including the findings of fact pertaining to the medical evidence presented. Sears Roebuck & Co. v. The Industrial Comm'n (1980), 79 Ill. 2d 59, 402 N.E. 2d 231.

Finally, we note that Arbitrator Galicia's decision did not contradict the earlier finding of Arbitrator Green. Arbitrator Galicia did not say that no accident occurred. In fact, he awarded additional TTD that extended up until November 11, 1982, the date on which Dr. Mullan encouraged Treece to return to work.

Based on these findings, we reverse the circuit court's May 5, 1989, judgment and reinstate the Commission's October 20, 1987 decision. We need not determine whether on remand the Industrial Commission erred in awarding penalties under sections 19(1) and 19(k) and attorney fees under section 16. Because the Commission's original decision is reinstated, the Industrial Commission's decision on remand is rendered moot. We likewise find moot Lyon's contention that on remand the Industrial Commission exceeded the scope of the circuit court's order.

The circuit court's May 5, 1989, judgment is reversed, and the Commission's October 20, 1987, decision is reinstated.

Reversed.

STOUDER, J., with MCCULLOUGH, P.J., WOODWARD, JR., LEWIS, J., RAKOWSKI, J., concurring.

Dated: May 15, 1992